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Aggravated Identity Theft is Only Punishable under Federal Statute if the Accused Knew That the Identification Information He Employed Actually Belonged to Another Individual: *Flores-Figueroa v. United States*

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Aggravated Identity Theft is Only Punishable Under Federal Statute if the Accused Knew that the Identification Information he Employed Actually Belonged to Another Individual: *Flores-Figueroa v. United States*

UNITED STATES—AGGRAVATED IDENTITY THEFT—STATUTORY CONSTRUCTION—KNOWLEDGE REQUIREMENT—The United States Supreme Court held that for a defendant to receive an additional two-year prison sentence under the federal aggravated identity theft statute, the government must prove that the defendant knew that the identification information he used actually belonged to another individual.

Flores-Figueroa v. United States, 129 S. Ct. 1886 (2009).

I. THE FACTS OF *FLORES*

The Petitioner, Ignacio Flores-Figueroa, a citizen of Mexico, entered the United States equipped with a falsified Social Security number and alien registration card in order to bypass immigration employment restraints.[1] Flores gave the documents, which identified him by his real name, to his employer in 2006.[2] However, the identification numbers on the credentials matched information that belonged to other individuals registered in the United States.[3]

II. THE PROCEDURAL HISTORY OF *FLORES*

Upon receipt of the documentation, Flores's employer notified U.S. Immigration and Customs Enforcement.[4] The United States prosecuted Flores in the United States District Court for the Southern District of Iowa.[5] Flores pled guilty to two counts of misuse of immigration documents and one count of entry into the country without inspection.[6] Flores also pled not guilty to two counts of aggravated identity theft and proffered the defense that

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1. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1889 (2009). Flores also provided a false name, birth date, Social Security number, and alien registration card to his employer in 2000. *Flores*, 129 S. Ct. at 1889. Although Flores gave false information to his employer in both 2000 and 2006, the 2000 information was completely fictitious and thus not an issue under the aggravated identity theft statute. *Id.* Flores was employed by L & M Steel Services, Inc. during the 2006 incident. United States v. Flores-Figueroa, 274 F. App'x 501, 501 (7th Cir. 2008) (per curiam), *rev'd*, 129 S. Ct. 1886 (2009).

2. *Flores*, 129 S. Ct. at 1889.

3. *Id.*

4. *Id.*

5. *Flores*, 274 F. App'x at 502.

6. *Id.* at 501. Entering the country without inspection occurs when an alien:

> (1) [E]nters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact . . . .

8 U.S.C. § 1325(a) (2006).

Also, misusing immigration documents occurs when:

> [a person] knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained . . . .

18 U.S.C. § 1546(a) (2006).

because the government failed to establish that he knew that the information on the falsified documents actually belonged to another person, all of the elements of the crime were not satisfied and therefore did not warrant conviction.[7] The district court found Flores's contentions unpersuasive and sentenced him to fifty-one months in prison for the two admitted crimes, along with an additional twenty-four-month mandatory incarceration for aggravated identity theft.[8]

Flores appealed the aggravated identity theft conviction to the United States Court of Appeals for the Eighth Circuit and again asserted that the prosecution failed to establish the knowledge requirement.[9] The government responded that the term "knowingly," as used in the statute, only applied to the first set of verbs in the statute: "transfers, possesses, or uses."[10] Conversely, Flores argued that the knowledge requirement not only applied to the verbiage, but also to the expression "of another person" and thus compelled the prosecution to demonstrate that the accused had knowledge that the information unlawfully used corresponded to a real person.[11]

The court of appeals, following their precedent in *United States v. Mendoza-Gonzalez*,[12] concluded that the knowledge requirement only controlled the verbs in the statute and not through the end of the statute to the phrase "of another person."[13] Ultimately, by adhering to the *Mendoza* decision, the court of appeals decided that the government was not required to show that Flores knew

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7. *Flores*, 274 F. App'x at 501-02. The federal aggravated identity theft statute reads: "Whoever, during and in relation to any felony violation enumerated in subsection (c), knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years." 18 U.S.C. § 1028A(a)(1) (2006). Entering the United States without inspection and misusing immigration documents were included in the underlying "enumerated felonies" and would support the additional two year sentence if applicable. *See* 18 U.S.C. § 1028A(c).

8. *Flores*, 274 F. App'x at 502. Flores was sentenced to seventy-five months in prison total. *Id.*

9. *Id.* The government's exact contention, as described by the court of appeals, was that the aggravated identity theft statute "requires the Government to prove that a defendant knew that the means of identification belonged to another person." *Id.*

10. *Id.* (quoting 18 U.S.C. § 1028A(a)(1)).

11. *Id.* (quoting 18 U.S.C. § 1028A(a)(1)).

12. 520 F.3d 912, 914-16 (8th Cir. 2008) *vacated*, 129 S. Ct. 2377 (2009). The *Mendoza* court concluded, "we find that the plain language of § 1028A(a)(1) limits 'knowingly' to modifying 'transfers, possesses, or uses' and not 'of another person.' Thus, we conclude that § 1028A(a)(1) is unambiguous and that the Government was not required to prove that Mendoza-Gonzalez knew that Gurrola was a real person . . . ." *Mendoza-Gonzales*, 520 F.3d at 915.

13. *Flores*, 274 F. App'x at 502.

that the information used on the employment documents actually matched that of another person and upheld the aggravated identity theft conviction.[14]

III. *FLORES* AT THE SUPREME COURT OF THE UNITED STATES

A. *Issue on Certiorari*

The Supreme Court of the United States granted certiorari due to a split in the circuits over the interpretation of the statutory provision at issue.[15] The Court faced the question of whether the aggravated identity theft law compelled federal prosecutors to prove that a defendant had knowledge that the identification information unlawfully utilized actually and already corresponded to another person.[16] Justice Breyer delivered the opinion of the Court and concluded that the statute required such a knowledge element.[17]

B. *Justice Breyer's Majority Opinion*

The Court began its multiple-front attack on the government's position with a simple review of ordinary English language rules.[18] The majority found the government's contention that the term "knowingly" only applied to a portion of the statute's language unpersuasive, and believed imposing an additional two-year sentence on an individual who did not have knowledge that the identification information belonged to another person was senseless.[19] English grammar, as Justice Breyer noted, normally treats an adverb ("knowingly" in this case) as modifying not only verbs that follow it, but also the subject of those verbs.[20] The Court continued that the adverb tells the reader how the whole act was accomplished (with "knowledge" in this case), including the object of the sen-

14. *Id.*
15. *Flores*, 129 S. Ct. at 1889.
16. *Id.* at 1888. The requirement that the defendant know that the identification information belongs to an actual person is contrasted with the situation where the identification is completely forged. *Id.* at 1889. Completely forged identification occurs when there is "a group of numbers that does not correspond to any real Social Security number." *Id.*
17. *Id.* Along with Justice Breyer, Chief Justice Roberts as well as Justices Stevens, Kennedy, Souter and Ginsburg joined in the majority opinion. *Id.*
18. *Id.* at 1890 (majority opinion).
19. *Id.*
20. *Flores*, 129 S. Ct. at 1890.

tence.[21] The majority agreed that although the sentences could be construed otherwise, the Court's interpretation was the "normal" view in light of average English usage.[22] Examples showing a different result were not easily discoverable by the Court, which acknowledged that such differing interpretations were normally due to atypical contexts or other linguistic clues.[23]

The majority's second reason for reversing Flores's conviction for aggravated identity theft was the fact that average construction of criminal laws coincided with the normal English usages detailed above.[24] Specifically, the Court opined that when the term "knowingly" precedes the components of a crime, the term is interpreted as modifying every component thereafter.[25] The Court noted numerous examples in accordance with this rule of interpretation and observed that the prosecution provided no persuasive examples to the contrary.[26]

Justice Breyer then presented the third reason for reversing the lower courts, denouncing an intricate challenge from the prosecu-

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21. *Id.* The majority listed numerous examples to further their point. *Id.* "[I]f the bank official said, 'Smith knowingly transferred the funds to the account of his brother . . .' [and] if the bank official later told us that Smith did not know the account belonged to Smith's brother, we should be surprised." *Id.* Also, "[i]f a child knowingly takes a toy that belongs to his sibling, we assume that the child not only knows that he is taking something, but that he also knows that what he is taking is a toy and that the toy belongs to his sibling." *Id.*

22. *Id.*

23. *Id.* at 1891. "As Justice Alito notes [in his concurrence], the inquiry into a sentence's meaning is a contextual one." *Id.*

24. *Flores*, 129 S. Ct. at 1891.

25. *Id.* The Court detailed examples of where such a rule of interpretation was applied. *Id.* The Court previously interpreted a federal food stamp statute that said, "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [law]" is subject to imprisonment. Liparota v. United States, 471 U.S. 419, 420 (1985) (quoting 7 U.S.C. § 2024(b)(1)). The Court held that the word "knowingly" applied to the phrase "in any manner not authorized by [law]." *Liparota*, 471 U.S. at 433. The interpretation in *Liparato* stood even in the face of the legal maxim "ignorance of the law is no excuse." *Flores*, 129 S. Ct. at 1891.

26. *Flores*, 129 S. Ct. at 1891. The majority supported their position with another example as well. *Id.* The Court interpreted the statute that made it illegal for "[a]ny person who-(1) knowingly transports or ships using any means or facility of interstate or foreign commerce by any means including by computer or mails, any visual depiction, if-(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct." United States v. X-Citement Video, Inc., 513 U.S. 64, 68 (1994) (quoting 18 U.S.C. § 2252(a)(1)(A)). The Court decided that the term "knowingly" modified the phrase "the use of a minor." *X-Citement Video*, 513 U.S. at 69. The language at issue in *X-Citement Video* "was more ambiguous than the language [in *Flores*] not only because the phrase 'the use of a minor' was not the direct object of the verbs modified by 'knowingly,' but also because it appeared in a different subsection." *Flores*, 129 S. Ct. at 1891 (citing *X-Citement Video*, 513 U.S. at 68-69). Also, the interpretation in *X-Citement Video* was accomplished even though "many sex crimes involving minors do not ordinarily require that a perpetrator know that his victim is a minor." *Id.*

tion incorporating another section of the statute at issue.[27] The Court noted that a related crime described by the statute allowed aggravated identity theft to occur with terrorism violations.[28] The Court also identified that the prosecution alleged that Flores's interpretation of the statute at issue would render a portion of the terrorism provision, which read "of another person," irrelevant.[29] To that effect, the Court observed that the terrorism portion applies to one who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person *or a false identification document*."[30]

The government's argument with respect to this provision, the majority opined, reduced to four steps.[31] Step one of the government's theory reminded the Court that it should not construe a statute in a way which "makes some of the language superfluous."[32] The second step stated that a person who knows that he is using a "means of identification" illegally must know that the document either belongs "to another person" or is a "false identification document" because no other alternatives exist.[33] The third step explained that requiring the accused to possess knowledge that the "means of identification" was "of another person" would render meaningless the corresponding provision in the terrorism statute.[34] The final step cautioned that the Court should not con-

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27. *Flores*, 129 S. Ct. at 1892.

28. *Id.* The statute is closely analogous to the law at issue, but punishes a person who "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person or a false identification document." *Id.* (quoting § 1028A(a)(2)).

29. *Id.*

30. *Id.* (quoting § 1028A(a)(2)) (emphasis added to show the addition to the terrorism provision that is not present in the section at issue in *Flores*).

31. *Id.*

32. *Flores*, 129 S. Ct. at 1892. Extending the knowledge requirement throughout the entire offense would, as the government contended, apply the statute to "one who 'knowingly transfers, possesses, or uses, without lawful authority, a means of identification *knowing that it belongs to* another person or is a false identification document.'" Brief for the United States at 14, *Flores*, 129 S. Ct. 1886, 2009 WL 191837 (No. 08-108) (quoting United States v. Miranda-Lopez, 532 F.3d 1034, 1042 (9th Cir. 2008) (Bybee, J., concurring in part and dissenting in part).

33. *Flores*, 129 S. Ct. at 1892. The only way an actor can perform the actions unlawfully is to have, in the government's opinion, knowledge of one of the two scenarios. Brief for the United States, *supra* note 32, at 12-16.

34. *Flores*, 129 S. Ct. at 1892. If the actor was required to have knowledge not only of his action, but also that the means of identification were used in an unlawful manner, then there would be no point in reiterating that the two scenarios at the end of the offense had to be performed with knowledge as well. Brief for the United States, *supra* note 32, at 12-14. The government furthered that subjective knowledge of illegality on the part of the actor, as advocated by Flores's construction of the statute, already implies that the person performs the actions either knowing that the identification belongs to another person or is falsified. *Id.*

strue the same phrase ("of another person") in two related sections of the same statute incongruently.[35]

The majority quickly rejected the government's intricate textual challenge because of two substantial flaws.[36] Primarily, the second step of the government's argument, identifying the two possible classes of knowledge, was incomplete because there were other conceivable options for knowingly procuring an unlawful use of a "means of identification."[37] Also, even if the circumstances identified by the government were the only two options, there would be no reason to reiterate them both at the end of the terrorism statute.[38] The Court, using their own interpretation of the government's textual contentions, determined that the terms had a meaningful place in the statute even under Flores's construction of the offense and were not superfluous.[39]

Furthermore, the majority considered whether the legislature intended the breadth of the statute to even punish those who were unaware that the identification information belonged to a real person.[40] Although the history of the law was substantially inconclusive, the majority pointed to instances that supported either side at least slightly.[41] The Court uncovered some reports from the House of Representatives that failed to distinguish "identity theft," which is using the information of another, from "identity fraud," which is simply using fictitious information.[42] The Court explained that treating the terms interchangeably suggested that the statute at issue was drafted to apply even without knowledge that the information belonged to another person, but the offenses eventually found segregated places in the enacted statutes themselves.[43]

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35. *Flores*, 129 S. Ct. at 1892.

36. *Id.*

37. *Id.* "One could, for example, verbally provide a seller or an employer with a made-up Social Security number, not an 'identification document,' and the number verbally transmitted to the seller or employer might, or might not, turn out to belong to another person. The word 'knowingly' applied to the 'other person' requirement (even in a statute that similarly penalizes use of a 'false identification document') would not be surplus." *Id.*

38. *Id.*

39. *Flores*, 129 S. Ct. at 1892.

40. *Id.* Justice Breyer described those actors without knowledge that the information already belonged to a real person as "those who do not *intend* to cause this further harm" of using an existing person's identification. *Id.*

41. *Id.* at 1891.

42. *Id.* at 1892-93.

43. *Id.* at 1893. The majority found that a nearby section of the statute at issue, 18 U.S.C. § 1028, included "fraud" in the title, while the section at issue in the case used "identify theft" in its title. *Id.*

Finally, the majority noted the practical barriers to proving beyond a reasonable doubt that the accused had the requisite knowledge to be guilty of aggravated identity theft.[44] Often, the Court observed, the illegal immigrant does not care whether the information detailed on his paperwork already corresponds to another person or is otherwise completely fictitious.[45] Thus, even if enforcement barriers arise, the majority reinforced that such difficulties would still not prevail over the clear language of the statute.[46]

In the end, the Court found the government's contentions unpersuasive when compared to the normal English meaning of the language and general statutory interpretation.[47] Justice Breyer, writing for the majority, concluded that the aggravated identity theft statute at issue required the government to prove that Flores had knowledge that the identification information he utilized belonged to another individual.[48] Consequently, the Court reversed the judgment of the court of appeals and remanded the case for additional proceedings.[49]

C. Justice Scalia's Concurrence

Justice Scalia concurred in the overall result reached by the majority, but believed that the result could have been reached with less judicial inquiry.[50] He agreed that the knowledge requirement extended not only to the verbs, but also to the phrase "of another person."[51] In his opinion, however, this result could have been reached solely through analysis of the English language, and the majority overstepped their judicial bounds by relying on other sources for support beyond the clear statutory wording.[52]

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44. *Flores*, 129 S. Ct. at 1893.

45. *Id.* Justice Breyer stated that it was relatively easy to prove knowledge in normal identity theft cases, as opposed to immigration cases, such as stealing information to access another's bank account or instances of dumpster diving. *Id.*

46. *Id.* at 1893. The Court was unable to "find indications in statements of [the statute's] purpose or in the practical problems of enforcement sufficient to overcome the ordinary meaning, in English or through ordinary interpretive practice, of the words that [Congress] wrote." *Id.* at 1894.

47. *Id.* at 1894.

48. *Id.*

49. *Flores*, 129 S. Ct. at 1894.

50. *Id.* at 1894 (Scalia, J., concurring). Justice Scalia was joined by Justice Thomas. *Id.*

51. *Id.*

52. *Id.* "The statute's text is clear, and I would reverse the judgment of the Court of Appeals on that ground alone." *Id.* at 1895.

The majority stated that courts normally apply the term knowingly, which introduces the components of a crime, to every portion of the offense.[53] Justice Scalia reasoned that such a procedure may have been followed by the majority of courts when construing criminal statutes, but the practice was in no way the controlling rule for interpretation.[54] The majority's support for their suggestion of such a rule, *United States v. X-Citement Video, Inc.*,[55] was wrongly decided in Justice Scalia's eyes and incorrectly relied upon by the majority in this case.[56] In *X-Citement Video*, the concurrence contested, such a rule could not apply because the legislature expressly and cautiously restricted the reach of the knowledge requirement.[57] Furthermore, Justice Scalia refused to support the use of the history of the legislation to legitimize the interpretation because the weight of such information was questionable at best.[58]

D. Justice Alito's Concurrence

Justice Alito also wrote a separate concurring opinion in which he agreed with the final disposition of the case, but only agreed with part of the majority's rationale.[59] He was concerned that the majority's reasoning could be construed as promulgating an inflexible rule of interpretation for statutes.[60] Justice Alito believed that examples which did not coincide with the rule were readily available and that context was actually the element that controlled the scope of "knowingly" in the usual English sentence.[61] Also, Justice Alito pointed out that the wording of a criminal code

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53. *Id.* at 1891 (majority opinion).

54. *Flores*, 129 S. Ct. at 1894 (Scalia, J., concurring).

55. *X-Citement Video*, 513 U.S. 64.

56. *Flores*, 129 S. Ct. at 1894 (Scalia, J., concurring). Justice Scalia believed that the majority in *X-Citement Video* wrongly "converts the rule of interpretation into a rule of law, contradicting the plain import of what Congress has specifically prescribed regarding criminal intent." *X-Citement Video*, 513 U.S. at 81 (Scalia, J., dissenting).

57. *Flores*, 129 S. Ct. at 1894.

58. *Id.* at 1894-95.

59. *Id.* at 1895. (Alito, J., concurring).

60. *Id.* Justice Alito suspected that "the Court's opinion will be cited for the proposition that the *mens rea* of a federal criminal statute nearly always applies to every element of the offense." *Id.*

61. *Id.* Justice Alito expanded his analysis with an example stating "'[t]he mugger knowingly assaulted two people in the park—an employee of company X and a jogger from town Y.' A person hearing this sentence would not likely assume that the mugger knew about the first victim's employer or the second victim's home town." *Id.*

is far from the linguistic construct used to convey a similar knowledge element in everyday speech.[62]

Justice Alito proposed a revised rule that allowed a court to begin with the broad proposition that the knowledge requirement pertained to each portion of the crime.[63] He qualified the new rule with the insistence that there would be times when context could defeat such a supposition.[64] The government, the concurrence noted, failed to identify any such context to support their contentions and that the government's mode of interpretation in practice would produce abnormal results.[65]

Finally, the government's theory of restricting the scope of the knowledge requirement only to the verbs in the offense would base the additional two-year prison sentence, in Justice Alito's view, predominantly on chance.[66] Overall, Justice Alito departed from the majority's rationale to the extent that it adopted a strict rule of statutory construction, but still agreed with the underlying reversal of Flores's conviction for aggravated identity theft.[67]

IV. THE CIRCUIT-SPLIT OVER THE KNOWLEDGE REQUIREMENT PRIOR TO *FLORES*

Flores was the culmination of decisions following Congress's enactment of the Identity Theft Penalty Enhancement Act ("Act")[68] in 2004 to counter mounting anxiety due to the identity theft epidemic.[69] The Act introduced the offense at issue in *Flores*, "aggravated identity theft," which mandated incarceration extensions in

62. *Flores*, 129 S. Ct. at 1895 (Alito, J., concurring). "For example, a speaker might say: 'Flores-Figueroa used a Social Security number that he knew belonged to someone else' . . . ." *Id.*

63. *Id.*

64. *Id.* For example, federal law makes it unlawful to transport a minor with intent to engage such minor in criminal sexual activity. *Id.* (citing 18 U.S.C. § 2423(a) (2006)). The statute provides: "A person who knowingly transports an individual who has not attained the age of 18 years . . . ." *Id.*). Courts of Appeals consistently applied the statute without regard to whether the defendant knew the victim's age. *Id.* at 1895-96.

65. *Id.* at 1896.

66. *Id.* Justice Alito stated that "[i]f it turns out that the number belongs to a real person, two years will be added to the defendant's sentence, but if the defendant is lucky and the number does not belong to another person, the statute is not violated." *Id.*

67. *Flores*, 129 S. Ct. at 1896 (Alito, J., concurring).

68. 18 U.S.C. § 1028A (2006).

69. 81 AM. JUR. 3D *Proof of Facts* § 113, § 10 (2009). The amendment established, inter alia, penalties for the newly created crime of aggravated identity theft. *Id.* Aggravated identity theft had two variations. Identity Theft Penalty Enhancement Act § 2. A mandatory two-year prison sentence will be added to an underlying offense for aggravated identity theft normally, while a five-year sentence is added for violations with regards to terrorism offenses. *Id.*

addition to the prison term attached to conviction for underlying enumerated crimes.[70]

A. *The Fourth Circuit:* Crounsset

Two divergent views emerged as to the interpretation of the term "knowingly" in the statute, which created a split in the circuits and among district courts as to the breadth of the knowledge requirement.[71] The United States District Court for the Eastern District of Virginia initiated the judicial schism when faced with the issue in *United States v. Crounsset*.[72] The court decided that the statute only required the government to show that the information on the passport used by the defendant was fraudulent, not that the defendant knew that the information actually belonged to another person.[73] Interpreting the statute in any other manner would, in the District Court's opinion, add another requisite element for conviction that was not expressed in the plain statutory language.[74] District Judge Ellis presided over the case and also looked at the practical enforcement implications of expanding the knowledge requirement.[75] Ultimately, the court realized that such an expansion of the knowledge element created the possibility of an insuperable barrier for conviction.[76]

B. *The Ninth Circuit:* Beachem

The inter-circuit battle lines were quickly drawn as the United States District Court for the Western District of Washington ar-

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70. *See* 18 U.S.C. § 1028A(a)(1-2).

71. *See Flores*, 129 S. Ct. at 1889. The Court in *Flores* "granted certiorari to consider the 'knowledge' issue—a matter about which the Circuits have disagreed." *Id.*

72. 403 F. Supp. 2d 475 (E.D. Va. 2005) (mem.). In *Crounsset*, the defendant entered the United States from Buenos Aires, Argentina at Dulles International Airport. *Crounsset*, 403 F. Supp. 2d at 476. The defendant presented a Dominican Republic passport with his picture on it, but used the name and identification information of Sandy Garcia. *Id.* Suspicions arose as the defendant's stories did not add up and an electronic fingerprint scan through the FBI database finally revealed that the defendant was traveling under falsified information. *Id.* at 477. Further investigation revealed that the defendant had twice been removed from the country and banned from entering the United States without permission for a twenty-year period. *Id.*

73. *Crounsset*, 403 F. Supp. 2d at 483. Illegal reentry of an illegal alien under 8 U.S.C. § 1326(a) was a predicate offense to support the additional prison term for aggravated identity theft. *Id.* at 480-81 (citing 18 U.S.C. § 1028A(c)(10)).

74. *Id.* The court denied defendant's motion for acquittal on the aggravated identity theft count. *Id.*

75. *Id.*

76. *Id.* Such enforcement difficulties were discounted by the Supreme Court. *Flores*, 129 S. Ct. at 1894.

rived at a different conclusion in *United States v. Beachem* on the same day that *Crounsset* was decided.[77] The court faced the issue of the accurate construction of the aggravated identity theft offense.[78] District Judge Pechman presided and concluded that the statute compelled the government to prove that the accused knew, at the time of the offense, that the information in question belonged to another person.[79]

After reviewing the legislative history, the court found that Congress expressly planned to allow for courts to levy increased punishments against individuals who stole identities.[80] Generally, Judge Pechman agreed that the offense of theft included the intent to deprive another.[81] The District Court saw no reason to abandon this well-established mens rea requirement of theft in a federal statute aimed at averting stealing.[82] Applying the mens rea for theft to the statute at issue, the court determined that the prosecution must establish that the defendant had knowledge that the identification he used already belonged to another person.[83]

C. *The Fourth Circuit:* Montejo

The Court of Appeals for the Fourth Circuit joined the divergence in *United States v. Montejo*.[84] The only issue on appeal from a conviction for aggravated identity theft was whether the defendant needed specific knowledge that the identification numbers he used belonged to another person.[85] The Fourth Circuit ruled that

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77. 399 F. Supp. 2d 1156 (W.D. Wash. 2005). *Beachem*, like *Crounsset*, was decided on November 21, 2005. *Beachem*, 399 F. Supp. 2d at 1156; *Crounsset*, 403 F. Supp. 2d at 475.

78. *Beachum*, 399 F. Supp. 2d at 1156. *Beachem* was slightly different factually from the immigration-based cases because Tammy Beachem was an American citizen who was accused of using Social Security numbers to open up bank accounts under false identities. *Id.* at 1157. The numbers turned out to belong to living people in the United States. *Id.*

79. *Id.* at 1156-57. The defendant claimed that the Social Security numbers were arbitrarily generated. *Id.* at 1157.

80. *Id.* at 1158.

81. *Id.* (citing United States v. Montejo, 353 F. Supp. 2d 643, 654 (E.D. Va. 2005)).

82. *Beachem*, 399 F. Supp. 2d at 1158.

83. *Id.* at 1157-58. The defendant's Motion to Dismiss was still denied because the prosecution possessed circumstantial evidence that could satisfy the knowledge requirement. *Id.* at 1158. The possibility of satisfying all the elements of the statute raised a question of material fact, so the preliminary motion had to be denied. *Id.*

84. 442 F.3d 213 (4th Cir. 2006), *cert. denied,* 549 U.S. 879 (2006), *abrogated by Flores-Figueroa*, 129 S.Ct. 1886.

85. *Montejo*, 442 F.3d at 214. The defendant in *Montejo* claimed not to know that the Alien Registration and Social Security numbers he used to gain employment in the United States were already assigned to another person. *Id.* at 214-15. He did know that the numbers were not his own because he purchased the documents for sixty dollars in Phoenix, Arizona shortly after he crossed the border from Mexico. *Id.* at 214.

to violate the statute and support a conviction of aggravated identity theft, the defendant need not have knowledge that the information was assigned to another individual.[86]

The court began its analysis by reviewing well-established grammatical rules.[87] Circuit Judge Widener explained the reasoning of the court and stated that proper English demanded that the adverb "knowingly" be in as close proximity to the words it alters as possible.[88] Also, the court maintained that simply by placing "knowingly" in front of a long predicate did not extend the modification through the remainder of the text.[89]

Judge Widener reviewed cases which construed similar statutes to support the court's contention that the knowledge requirement was restricted.[90] Finally, the court determined that the statute was unambiguous and the legislative history identified the goal of allowing an enhanced penalty for aggravated identity theft.[91] The court concluded that by allowing conviction irrespective of the defendant's knowledge of whether the information he used belonged to another person, both the legislative intent and proper rules of grammar were satisfied.[92]

D. The Eleventh Circuit: Hurtado

The Eleventh Circuit in *United States v. Hurtado* espoused slightly different rationale.[93] When faced with the issue of the knowledge requirement in the aggravated identity theft statute,

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86. *Id.* at 217.

87. *Id.* at 215. *Montejo* was the first time the Fourth Circuit Court of Appeals was required to construe the federal aggravated identity theft statute. *Id.* at 213-14.

88. *Id.* at 215.

89. *Id.*

90. *Montejo*, 442 F.3d at 216. *See, e.g.*, United States v. Cook, 76 F.3d 596, 601 (4th Cir. 1996) (construing a drug offense which began with "knowingly").

91. *Montejo*, 442 F.3d at 217. Without ambiguity, the court refrained from applying the rule of lenity. *Id.* The rule of lenity is a "judicial doctrine holding that a court, in construing an ambiguous criminal statute . . . should resolve the ambiguity in favor of the more lenient punishment. BLACK'S LAW DICTIONARY 1449 (9th ed. 2009).

92. *Montejo*, 442 F.3d at 217.

93. 508 F.3d 603 (11th Cir. 2007) (per curiam), *cert. denied.*, 128 S. Ct. 2903 (2008), *abrogated by Flores-Figueroa*, 129 S. Ct. 1886 (2009). The defendant Hurtado was arrested following a meeting to review his passport application, which was filed under a fraudulent name. *Hurtado*, 508 F.3d at 604-05. Suspicions mounted during the interview as the defendant failed to correctly answer various questions and after being informed that it was a crime to lie to federal agents, Hurtado admitted that he was using a false name. *Id.* at 605. Upon a search at the time of arrest, the defendant possessed a driver's license, bank debit card, library card, and paycheck all issued under the alias Hurtado used to apply for a passport. *Id.* The defendant even registered and insured an automobile under the fraudulent name. *Id.*

the per curiam opinion agreed with the emerging majority and held that the offense did not require the prosecution to prove that the defendant had knowledge the information he utilized was already assigned to another person.[94]

The court reasoned that if the legislature wished to expand the requisite knowledge to the entire text, it easily could have added that the identification had to be "known to belong to another actual person."[95] Enlargement of the knowledge requirement, in the court's opinion, would allow a defendant to fraudulently exploit the identification information of another during the commission of another underlying offense.[96] The perpetrator could escape enhanced penalization for such conduct as long as he remained ignorant as to whether the information actually belonged to another.[97] In the end, the Eleventh Circuit solidified its place in the judicial tug-of-war by refusing to require the government to prove that the defendant knew that the information belonged to another person under the aggravated identity theft statute.[98]

E. The Eighth Circuit: Intra-District Conflict

Even courts within individual circuits had difficulty determining the exact treatment of "knowingly" in the statute.[99] In *United States v. Salazar-Montero*,[100] the United States District Court for the Northern District of Iowa laid the basis for intra-circuit chaos in the Eighth Circuit when it faced the knowledge issue in late 2007.[101] The district court ruled that knowledge was required for every portion of the statute, including whether the information belonged to another person.[102] The court disagreed with the gov-

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94. *Hurtado*, 508 F.3d at 610.

95. *Id.* at 609. Because the adverb "knowingly" was placed directly in front of the verbs "transfers, possesses, or uses," the court held that the modifier applied to the verbs and not the subsequent language of the statute. *Id.* (citing United States v. Jones, 471 F. 3d 535, 539 (4th Cir. 2006)).

96. *Id.*

97. *Id.* The court stated that the plain meaning of the statute did not warrant such a reading. *Id.*

98. *Id.*

99. *See, e.g.*, United States v. Salazar-Montero, 520 F. Supp. 2d 1079 (N.D. Iowa 2007) (mem.), *abrogated by* United States v. Mata-Lara, 527 F. Supp. 2d 887 (N.D. Iowa 2007).

100. *Salazar*, 520 F. Supp. 2d at 1079.

101. *Id.* at 1083. The defendant possessed a Social Security card, IRS Individual Taxpayer Identification Number card, and a North Carolina Driver's License. *Id.* at 1082. The Social Security number was already assigned to another person. *Id.*

102. *Id.* at 1094. The decision was rendered in response to the defendant's Motion for Legal Ruling on the Elements of the Offense Charged under the Federal Rule of Evidence 12(b)(2). *Id.* at 1082.

ernment's contention that the mens rea requirement applied only to the means of identification and not to whether the information belonged to another person.[103] Judge Bennett presided and agreed that a majority of courts, along with at least three cases within the district, followed the restricted knowledge requirement urged by the prosecution, but still declined to follow the majority view.[104]

Explanations from other jurisdictions were not satisfactory to the court in *Salazar* and Judge Bennett determined that no mandatory authority in the Eighth Circuit existed yet.[105] A plain language approach swayed the court even further from the government's argument and the court found that the knowingly element appeared to apply to the entire predicate because it was placed as close as possible to it.[106]

Next, the court echoed the sentiments of *Beachem* and acknowledged that theft normally required intent to deprive another.[107] Judge Bennett explained that one cannot intend to divest another person of his property unless the perpetrator has knowledge that such property does indeed belong to another person.[108] Furthermore, the district court believed that the statute was written with the intention of providing additional repercussions for aggravated identity theft, in contrast to only fraudulent action.[109]

Finally, Judge Bennett recognized that there was more than one possible reading of the statute, especially because different courts had already reached varying interpretations.[110] Ambiguity, the court noted, triggered various statutory interpretation tools not

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103. *Id.* at 1083. The government also asserted that other courts, including an apparent agreement from the Eighth Circuit, had held that the restricted view of the knowledge requirement should be applied. *Id.* at 1085-86.

104. *Id.* at 1082-92.

105. *Id.* at 1089-91. The court in *Salazar* believed that the Eighth Circuit in United States v. Hines, 472 F.3d 1038 (8th Cir. 2007), only determined that a showing that the defendant had knowledge that the means of identification belonged to another person would satisfy the statute, not whether such knowledge was necessarily required. *Salazar*, 520 F. Supp. 2d at 1088-89. The *Hines* case was cited by the government to bolster its contention that the Eighth Circuit would most likely agree with their limited view of the knowledge requirement. *Id.* at 1085.

106. *Salazar*, 520 F. Supp. 2d at 1091-92. The court found no reason to subdivide the predicate. *Id.* at 1092.

107. *Id.* at 1092.

108. *Id.*

109. *Id.* at 1092-93. Legislative history, in the court's opinion, reflected a concern for theft, as opposed merely for fraud. *Id.*

110. *Id.* at 1093. General rules of statutory interpretation required the court to look at the plain language of the statute first. *Id.* at 1086. If ambiguity is present, then the court held that the overall statutory structure, history and congressional intent may be referenced. *Id.* at 1087.

readily employed for perfectly clear statutes, including the rule of lenity.[111] Ultimately, the District Court concluded that the defendant must know that the means of identification belonged to another person before he can be convicted of aggravated identity theft.[112]

Salazar was short lived as the Court of Appeals for the Eighth Circuit reviewed the knowledge requirement again in *United States v. Mendoza-Gonzalez* in early 2008.[113] Circuit Judge Gruender wrote for the court and determined that the knowledge requirement of the aggravated identity theft statue did not reach the language of the entire statute as *Salazar* concluded.[114] The prevailing view in the circuit became that the government did not have to prove that the defendant knew the information belonged to another person.[115]

The court initially constrained itself to a plain language review of the statute, especially because the statute was viewed as unambiguous.[116] Under the "last antecedent rule," Judge Gruender explained that qualifying words and phrases only modify other words immediately before or after them in the sentence.[117] The modification, Judge Gruender continued, did not extend to other areas of the language which were more remote in textual distance.[118] Within such grammatical framework, the court believed that the immediacy of the word "knowingly" to the verbs of the statute evidenced Congress's intention that the adverb only alters the close-by verbiage.[119] The court therefore refused to extend "knowingly" throughout the entire statute.[120]

Going further, the Eighth Circuit believed that the same restricted view of the knowledge requirement would prevail even if sources besides the plain language of the statute were con-

111. *Salazar*, 520 F. Supp. 2d at 1093.

112. *Id.* at 1094.

113. *Mendoza*, 520 F.3d at 912. The defendant presented his employer with a false Social Security and photographic identification card. *Id.* Immigration and Customs Enforcement Agents raided the pork processing plant where the defendant worked and charged him with various immigration and identity theft offenses. *Id.* at 914.

114. *Id.* at 915.

115. *Id.* The defendant's convictions, which included aggravated identity theft, were affirmed. *Id.* at 913.

116. *Id.* at 915.

117. *Id.*

118. *Mendoza*, 520 F.3d at 915.

119. *Id.* at 915-16.

120. *Id.* at 916. The court would not look beyond the plain language analysis because the statute was unambiguous and only used other resources to solidify the conclusions. *Id.*

sulted.[121] Judge Gruender noted that although the Supreme Court of the United States had extended the term "knowingly" before to terms which were in further proximity within similar criminal laws, such an extension was only performed due to the fear of penalizing completely innocent conduct.[122] Punishment of an innocent person was not a concern to the court in *Mendoza* because the judges believed that because an underlying offense was required for an aggravated identity theft conviction, the accused already performed non-innocent conduct.[123] Finally, through the *Mendoza* decision, the Court of Appeals for the Eighth Circuit calmed any uncertainty within the circuit as to the reach of "knowingly" in the statute and held that the term only applied to "transfers, possesses, or uses" and not "of another person."[124]

F. The First Circuit: Estrada-Sanchez

The jurisdictional tensions intensified as new cases, such as *United States v. Estrada-Sanchez*,[125] brought previously silent districts into the mens rea debate.[126] In *Estrada*, Federal District Court in Maine faced a defendant's motion to dismiss a criminal indictment for aggravated identity theft.[127] The motion was based on the grounds that the government could not prove that the defendant knew the permanent resident and Social Security cards he used belonged to another person.[128] In denying the motion,[129] the court, through District Judge Woodcock, decided that the knowledge requirement did not extend to the defendant's awareness of whether the information already corresponded to another individual.[130]

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121. *Id.*
122. *Id.* at 917.
123. *Mendoza*, 520 F.3d at 914-15 (quoting 18 U.S.C. § 1028A(a)(1)).
124. *Id.* at 915.
125. 558 F. Supp. 2d 129 (D. Me. 2008).
126. *Estrada*, 558 F. Supp. 2d at 130. The defendant was indicted by a federal grand jury for various criminal violations including aggravated identity theft, possession of fraudulent immigration documents and Social Security fraud. *Id.*
127. *Id.* at 133 n.2.
128. *Id.* at 133.
129. *Id.* at 136. The district court also determined that the defendant's possession of an illegal permanent resident card was a predicate felony to support aggravated identity theft. *Id.* at 132.
130. *Id.* at 130. Judge Woodcock recognized that the defendant's contention in his Motion to Dismiss, mainly that the knowledge requirement applied to the entire statute, was the minority view. *Id.* at 133. Case law in other jurisdictions and district court decisions within the First Circuit supported a restricted view of the reach of the mens rea. *Id.* at 133-34.

As a question of first impression in the First Circuit, the district court highlighted that previous judiciary divergences were based on adherence to three focal points of disagreement.[131] The first judicial view, as pinpointed by the court in *Estrada*, concentrated on the consequences for the victim and the purpose of the statute overall.[132] Judge Woodcock, considering the fact that the victim was harmed irrespective of the thief's knowledge, concluded that Congress set out to deter identity theft through increased legal penalties for perpetrators.[133]

The second authoritative view discovered by the court centered on fairness to the defendant.[134] Under this view, Judge Woodcock found that because some jurisdictions determined the statute to be ambiguous, the government should be required to establish more elements before the increased punishment could be imposed.[135]

In the final approach identified by the court, the aggregate statutory scheme was examined.[136] The district court believed that the lawmakers understood possession of another person's identification during the commission of another predicate crime created a separate and higher risk than mere possession without other illegal conduct, warranting increased punishment.[137]

After considering all three views, Judge Woodcock agreed with the conclusion of a coordinate district court within the jurisdiction and concluded that the knowledge element did not apply to the defendant's knowledge regarding whether the fraudulent information he retained actually corresponded to another person.[138]

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131. *Estrada*, 558 F. Supp. 2d at 133-36. "Courts have marshaled impressive grammatical arguments to support their conclusions." *Id.* at 134.

132. *Id.* at 134.

133. *Id.* The court also acknowledged that the knowledge requirement would raise a significant evidentiary hurdle for the government to overcome before conviction. *Id.* Exceptional circumstances, as the court noted, would be needed before such proof could be established. *Id.*

134. *Id.* at 134-35.

135. *Id.* at 134. Judge Woodcock believed that unfairness could arise if an enhanced mandatory prison sentence was imposed on someone without the requisite knowledge. *Id.* at 135.

136. *Estrada*, 558 F. Supp. 2d at 135.

137. *Id.* at 136. The increased risk, as the court stated, was felt by both society and the individual victim. *Id.*

138. *Id.* at 136. The court agreed with Judge Hornby in *United States v. Godin*. *Id.* at 133, 136 (citing United States v. Godin, 489 F. Supp. 2d 118, 119-21 (D. Me. 2007)). Judge Hornby instructed the jury that "[t]he government is not required to prove that [the defendant] knew the means of identification actually belonged to another person." *Godin*, 489 F. Supp. 2d at 120.

G. *The First Circuit Reverses* Estrada

The consensus among the district courts in Maine was subsequently reversed when the Court of Appeals for the First Circuit determined that the mens rea requirement for aggravated identity theft extended to "of another person."[139] In *United States v. Godin*,[140] the court of appeals employed all available statutory construction devices, but was unable to determine the legislative intent.[141] Without being able to determine the breadth of the knowledge requirement through interpretation, the court concluded that the language remained ambiguous.[142]

Senior Circuit Judge Tashima writing for the court also found that the statutory structure, the title of the offense, and legislative history could not settle the ambiguity.[143] With ambiguity remaining, the court felt compelled to resolve the uncertainty in the defendant's favor under the rule of lenity.[144] Eventually, the court held that the knowledge requirement extended to the entire subsection of the statute.[145] A breaking point of judicial divisions over the construction of the statute was recognized by the court and Judge Tashima stated that the Supreme Court might find a solution for the vital question of statutory interpretation.[146]

H. *The Ninth Circuit:* Miranda-Lopez

The day before the First Circuit Court of Appeals sorted out the interpretive issues within its circuit, the Ninth Circuit was faced with the identical issue of whether the defendant must know that

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139. United States v. Godin, 534 F.3d 51, 56 (1st Cir. 2008) (quoting 18 U.S.C. § 1028A(a)(1)). The First Circuit determined that Judge Hornby had instructed the jury in error while *Godin* was at the district court level. *Godin*, 534 F.3d at 61. The defendant's conviction was reversed because the government failed to prove that the accused knew the means of identification belonged to another person. *Id.* at 53-54.

141. *Godin*, 534 F.3d 51. For instance, the court found that because they were interpreting a criminal statute instead of an English textbook, ordinary grammar was not satisfactory in determining the best or even most likely reading of the statute. *Id.* at 56-57.

142. *Id.* at 61.

143. *Id.* at 53, 61. The court stated that "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* (quoting United States v. Santos, 128 S. Ct. 2020, 2025 (2008)).

144. *Id.* at 61.

145. *Id.*

146. *Godin*, 534 F.3d at 65. "In the end, the Supreme Court may resolve this important question of interpretation of the [aggravated identity theft] statute." *Id.* In the alternative, the court believed that Congress might be prudent in clarifying the scope of the increased penalties under the aggravated identity theft offense with new legislation. *Id.*

the information he used belonged to another person in *United States v. Miranda-Lopez*.[147] The Ninth Circuit in *Miranda* held that proof of the falsity of the documentation used was not enough.[148] According to the court of appeals, the statute required that the defendant knew the means of identification he employed already belonged to another person to support the additional aggravated identity theft penalties.[149]

In so holding, Circuit Judge Silverman maintained that it was possible to interpret the statute as only extending the knowledge requirement to a portion of the text.[150] Although possible, Judge Silverman asserted neither logic nor grammar made such a construction the sole conclusion.[151] Furthermore, it was not unreasonable, in the court's opinion, to extend the knowledge requirement to the entire offense.[152] Even when the court applied the statutory history, the wording remained ambiguous.[153] The court resolved the ambiguity, as many sister courts did, in favor of the defendant under the interpretive rule of lenity.[154] In the end, the government was required to show knowledge for every element of the statute, which the court noted was not an impossible barrier to conviction.[155]

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147. 532 F.3d 1034, 1038 (9th Cir. 2008). The issue, as stated by the court, was: "[D]oes the adverb 'knowingly' in the statute modify 'of another person' or merely 'transfers, possesses or uses?'" *Miranda*, 532 F.3d at 1038.

148. *Miranda*, 532 F.3d at 1035. The defendant in *Miranda* was a citizen of El Salvador who had been previously deported from the United States. *Id.* Border Patrol in California noticed that the resident alien cards presented did not match the three individuals, including the defendant, in a car attempting to pass into the United States. *Id.* at 1035-36.

149. *Id.* at 1035. The defendant claimed that he fell asleep in an acquaintance's car after a night of alcohol consumption and did not wake up until he arrived at the Border Patrol Station. *Id.* at 1036. He stated he had no intention to reenter the country nor did he claim the resident identification card as his own. *Id.* Customs and Border Patrol Officer Terence Gibbs testified that the defendant was awake and alert and did indeed claim the resident card as his own. *Id.*

150. *Id.* at 1035, 1038.

151. *Id.*

152. *Id.*

153. *Miranda*, 532 F.3d at 1038-39.

154. *Id.* at 1040. The rule of lenity was applied because the court believed that the resolution would not conflict with the intent of Congress. *Id.* The case was reversed and remanded for reconsideration of the defendant's post-verdict motion for judgment of acquittal to allow each party to argue whether the knowledge requirement was actually satisfied. *Id.* at 1041.

155. *Id.* at 1040-41. Judge Bybee, during the dissenting portion of his separate opinion, proffered the theory used in the complex and confusing four-step approach by the government in *Flores*. *Miranda*, 532 F.3d at 1042-43 (Bybee, J., dissenting). The dissent noted that when the knowledge requirement was read into the nearby terrorism provision for aggravated identity theft, the phrase "knowing that it belongs to" is superfluous. *Id.* at 1042 (quoting 18 U.S.C. § 1028A(a)(2) (2006)). "A person who knowingly transfers a means of identification without lawful authority must necessarily know that the identification

V. THE IMPACT OF *FLORES* AND THE FUTURE

After a five-year journey of interpretation throughout the judicial circuits of the United States, there was still not a consistent interpretation of the aggravated identity statute.[156] Finally, the matter reached the Supreme Court and the ultimate arbiter of interpretive matters definitively extended the knowledge requirement to the entirety of the statutory language.[157]

Cases from the two diverging views contained strikingly similar fact patterns, identical issues, and analogous arguments to *Flores*, but reached exactly opposite conclusions throughout the federal circuits. The difficulties surrounding the aggravated identity theft offense are the perfect example of how statutory construction is truly a matter of interpretation.[158]

The Court was faced with a difficult question on an issue that would have widespread ramifications for Americans, immigrants, and the government alike. Difficult and divisive statutory conundrums have become natural territory for the Court.[159] Such situations are often included under the legal maxim "[h]ard cases make bad law,"[160] but the Court effectively avoided the generality in *Flores*. Even when faced with a difficult issue and a clear split of circuits, the Supreme Court arrived at the correct decision and espoused "good" law. *Flores* was successful for two primary reasons. First, the Court's decision mended a troubled textual issue that confused and divided many courts with similar statutes in the past. Second, the ruling comported with sensible public policies, including fairness and the notion that convictions should be based on fault or wrongdoing, instead of mere chance.

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either belongs to another person or that it is false; there are no other choices. It makes no sense to read into subsection (a)(2) the second 'knowing.'" *Id.* at 1042 (Bybee, J., dissenting). Judge Bybee believed that such a reading was unnecessary and even reached the realm of absurdity. *Id.* The majority rebutted the dissent by stating that the language was simply used to distinguish the aggravated identity theft sections from one another. *Id.* at 1040 n.5 (majority opinion).

156. *See Godin*, 534 F.3d at 65.

157. *Flores*, 129 S. Ct. at 1894 (2009).

158. *See, e.g., Miranda*, 523 F.3d at 1038-39. The court "recognize[d] . . . that the meaning of legislative history, like beauty, is in the eye of the beholder." *Id.* at 1039.

159. *See* SUP. CT. R. 10. The Supreme Court grants or denies writs of certiorari with reference to three "compelling reasons" to hear a case. *Id.* The reasons for granting certiorari include "important federal questions" and any combination of splits between the federal appellate courts or the highest state courts. *Id.*

160. BLACK'S LAW DICTIONARY 784 (9th ed. 2009). Under the definition of "hard case": "A lawsuit involving equities that tempt a judge to stretch or even disregard a principle of law at issue. Hence the expression, 'Hard cases make bad law.'" *Id.*

A. Successful Statutory Interpretation

There is no doubt that illegal immigration carries with it serious consequences for the nation,[161] but statutory interpretation transcends immigration alone because it affects every offense falling under a particular statute.[162] To that end, the interpretation in *Flores* will be quoted in the future as common sense approach to interpretation of criminal statutes. Indeed, the opinion's clarity and decisiveness will make it a formidable sword (or shield) for future litigants.

The Court in *Flores*, in keeping with its straightforward and understandable approach, decisively demonstrated that laws can be properly reviewed with an ordinary look to the English language as the practical starting and ending point.[163] Due to the fact that the ordinary interpretation of criminal statutes generally comports with grammatical rules, the Court was able to dispose of the case on clear and reasonably objective grounds.[164] A phrase such as "knowingly," which precedes and introduces the portions of a criminal law, is normally interpreted as applying to every word of the statute.[165] There was no indication, structural or otherwise, that the introductory knowledge requirement should be unusually restricted.

It is difficult to imagine arbitrarily cutting off the reach of "knowingly" after only the first few words of the offense. Additionally, once it is admitted that stopping the term's reach so early would be absurd, it is even more difficult to find a logical place to stop its effect prior to the end of the sentence. Once the knowl-

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161. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 552 (1976) ("Interdicting the flow of illegal entrants from Mexico poses *formidable law enforcement problems.*") (emphasis added); United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1975) ("[A]liens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.").

162. *See* Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). The Court noted the importance of statutory interpretation, especially for subsequent cases, by noting "that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson*, 491 U.S. at 172-73.

163. *Id.* at 1890. The Court found "strong textual reasons for rejecting the Government's position" and looked at ordinary English usage. *Id.*

164. *Id.* at 1890-91.

165. *Id.* at 1891.

edge requirement begins to wander past the introductory verbs, the period is its only reasonable stopping point.

With the bulk of analysis centering on relatively definite English writing maxims, the Court avoided extensively delving into the wealth of legislative history that usually accompanies federal laws.[166] The credibility of an opinion is enhanced immensely when a reader can step away and declare "it just makes sense." Any contrary reading of the aggravated identity theft statute would require a stretching of ordinary grammar and the expenditure of vital political capital.

The grammatical analysis even pleased the outspoken textualist Justice Scalia.[167] Even though Justice Scalia disapproved of the Court's analysis beyond the plain text,[168] it is still quite an accolade for a textual inquiry to satisfy the strict standards of the Justice.[169] The majority was convincing enough with just its review of the text, that Justice Scalia would have ended the opinion even more promptly than the majority did.[170]

Ultimately, *Flores* exemplified a more impartial and definite process of statutory interpretation as opposed to the confusing and seemingly biased employment of alternative sources of construction utilized by lower courts. A simplistic approach, coupled with an understandable analysis supported by the employment of English grammar rules and linguistic common sense, exemplified the Court's correct textual interpretation of the aggravated identity theft statute.

B. Public Policy Success

As Justice Alito persuasively noted, if the Court refused to extend the knowledge requirement for aggravated identity theft, convictions would be based predominantly on chance.[171] Rolling the dice and playing the odds do not foster public respect for the judicial process. Rather, certainty, demonstrable fault, and actual

166. *Id.* at 1892-93. The Court concluded that the statutory history was inconclusive overall. *Id.* at 1892.

167. *Flores*, 129 S. Ct. at 1894 (Scalia, J., concurring). Justice Scalia agreed that "[o]rdinary English usage supports [the majority's] reading." *Id.*

168. *Id.* Justice Scalia noted that the Court "is not content to stop at the statute's text, and I do not join that further portion of the Court's opinion." *Id.*

169. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 9-41 (1997).

170. *Id.* at 1895. Noting that "[t]he statute's text is clear, and I would reverse the judgment of the Court of Appeals on that ground alone." *Id.*

171. *Id.* at 1896 (Alito, J., concurring).

wrongdoing should be notions that the public perceives when examining the functions of the judiciary. It is only then that the words inscribed above the main entrance to the Supreme Court building, "Equal Justice Under Law,"[172] have any real meaning.

Without extension of the knowledge requirement, if the government discovers that the information the immigrant used belonged to another person, then a mandatory two-year prison sentence would be added to his underlying immigration offenses.[173] Alternatively, an apprehended foreign national would be subject only to other offenses of varying incarceration lengths if he fortuitously chose information which did not yet belong to an American. Both alternatives, in the prospect of employment, income, and liberty in the United States, are consequences that the immigrant would gladly risk. Basing incarcerations merely on chance also does not foster the public confidence necessary to the proper workings of the judiciary.[174] With a definite interpretation of the statutes, prosecutors can end the game of chance against immigrants and employ a truly practical enforcement method.

Furthermore, many immigrants care more about attaining a better life for themselves and their families than whether or not the information they use for employment already belonged to another person.[175] Many times they are not using the information to intentionally harm either.[176] Immigrants will reside in the murky arenas of chance and ignore whether the information they possess hit in the identification lottery already. Without a definitely defined offense and mens rea requirement, many of the difficulties surrounding immigration would remain. With the extension of

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172. Supreme Court of the United States, The Court and Constitutional Interpretation, http://www.supremecourtus.gov/about/constitutional.pdf (last visited Feb. 16, 2010).

173. 18 U.S.C. § 1028A(a)(1).

174. *See, e.g.*, Bush v. Gore, 531 U.S. 98, 157-58 (2000) (Breyer, J., dissenting). *Bush* is a recent example, as stated by Justice Breyer in his dissent, of the Court's own general recognition that its power is dependent on support of the people: "[C]onfidence is a public treasure. It has been built slowly over many years some of which were marked by a Civil War and the tragedy of segregation. It is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself." *Bush*, 531 U.S. at 157-58.

175. *See Flores*, 129 S. Ct. at 1893. The Court noted that in immigration cases it is possible that "a defendant knew the papers were not his. But perhaps the defendant did not care whether the papers (1) were real papers belonging to another person or (2) were simply counterfeit papers." *Id.*

176. Adam Liptak & Julia Preston, *Justices Limit Use of Identity Theft Law in Immigration Cases*, N.Y. TIMES, May 4, 2009, at A17. In the article, Chuck Roth, litigation director at the National Immigrant Justice Center in Chicago states that "[t]he court's ruling preserves basic ideals of fairness for some of our society's most vulnerable workers. . . . An immigrant who uses a false Social Security number to get a job doesn't intend to harm anyone, and it makes no sense to spend our tax dollars to imprison them for two years." *Id.*

the knowledge requirement, immigration enforcement measures already thinly stretched can be directed at those actually causing the most harm. The immigrants who use information knowing it to be stolen are the real threats for identity theft and other wrongs reaching beyond unlawful access into the country. The statute was created to combat the growing threat of identity theft, and the majority's decision furthers this goal.[177]

In addition, with 792,000 foreign nationals apprehended in 2008 alone, and close to ninety percent of the arrests of individuals from Mexico, illegal immigration has become a serious concern on the southwest border of the United States.[178] Apprehensions by the Department of Homeland Security have decreased over the past few years, but the problem is still prevalent.[179] The aggravated identity theft statute became a "favorite tool for prosecutors" in many immigration cases.[180] Government agents could threaten to impose the additional two-year mandatory sentence of aggravated identity theft unless the illegal workers pled guilty to lesser offenses.[181] There is an inherent unfairness in the situation, the severity of illegal immigration notwithstanding. Many immigrants do not intend to cause serious harm[182] and they often perform necessary jobs that many Americans traditionally shy away from. Illegal immigration can now be combated, without exploitation of the individuals, while still retaining ideas of patriotism and safe borders.

There is no doubt that the foreign nationals in many federal immigration raids are indeed acting illegally, but they should still be afforded the fairness that has become the cornerstone of American jurisprudence. Regardless of the benefits and downfalls intertwined into the illegal immigration scheme, the individuals in-

177. 81 AM. JUR. 3D *Proof of Facts* § 113, § 10 (2009).

178. OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SECURITY, IMMIGRATION ENFORCEMENT ACTIONS: 2008 1 (2009), http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

179. *Id.*

180. Liptak & Preston, *supra* note 176.

181. *Id.* One of the most widespread uses of the prosecution tool was at a meatpacking plant in Iowa in May 2008. *Id.* "Nearly 300 unauthorized immigrant workers from the plant, most of them from Guatemala, pleaded guilty to document-fraud charges rather than risk being convicted at trial of the identity-theft charge." *Id.* In most of the cases from Iowa, the prosecutors were only able to establish "that the Social Security numbers and immigration documents the workers had presented were false." *Id.*

182. *Id.* "Chuck Roth, litigation director at the National Immigrant Justice Center in Chicago [stated that 'a]n immigrant who uses a false Social Security number to get a job doesn't intend to harm anyone, and it makes no sense to spend our tax dollars to imprison them for two years." *Id.*

volved are still human and deserve a basic level of just treatment under the federal criminal code. Eliminating an abusive tool of prosecutors to elicit possibly incorrect or coercive guilty pleas is inconsistent with notions of fairness and justice.

The cases throughout the circuits exemplified that most of the litigation over the aggravated identity theft offense did indeed involve immigrants.[183] As noted above, the identity is a means to a legitimate end in the minds of many immigrants. Any damage that is sustained by the citizen is an ancillary consequence not necessarily contemplated by the actors.[184] If Congress intends to penalize such action by illegal immigrants, they can alter the statute to expressly reflect such a goal. Congress will have the chance to reform the law if the Supreme Court's ruling does not comport with their intentions.

Also, the Obama Administration publicized that it will shift the focal point of immigration enforcement to the employers who abuse the immigration system.[185] Employers who intentionally employ illegal immigrants in order to decrease costs through lower wages could become the next primary target in immigration enforcement.[186] Ultimately, illegal immigration is a problem that can be combated without oppressive prosecutorial and enforcement techniques, which are aided by a more certain aggravated identity theft statute.

VI. CONCLUSION

The Supreme Court's conclusion in *Flores* was a beneficial ruling for illegal immigrants, an emasculation of the federal prosecutor's favorite tool in many immigration cases, and most of all, a step forward in statutory interpretation. With clear and concise reasoning, *Flores* set forth a standard that should be mirrored by lower courts. *Flores* represents a relatively small obstruction for prosecutors who are already armed with a wealth of weapons to catch and charge perpetrators. Conversely, the Court's decision

183. *See Flores*, 129 S. Ct. at 1893. The widespread litigation involving immigrants may be due to the fact that "in the classic case of identity theft, intent is generally not difficult to prove. For example, where a defendant has used another person's identification information to get access to that person's bank account, the Government can prove knowledge with little difficulty." *Id.* In other instances such as "dumpster diving, computer hacking, and the like . . . intent should be relatively easy to prove, and there will be no practical enforcement problem." *Id.*

184. Liptak & Preston, *supra* note 176.

185. *Id.*

186. *Id.*

represents a significant leap forward for enhanced certainty in judicial interpretation of knowledge requirements and increased predictability for corresponding punishments in federal criminal statutes.

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